COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1416

ERIC PORTER & others.[1]

vs.

BRIGHTON GARDNER PROPERTIES, LLC, & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Plaintiff Eric Porter appeals from the judgment dismissing his complaint. The motion judge determined that Porter and the other plaintiffs lacked standing under the Boston zoning enabling act (Act), St. 1956, c. 665, § 11, as amended through St. 1993, c. 461, § 5, to contest a variance allowing defendant Brighton Gardner Properties, LLC (Brighton Gardner), to build a 129-unit mixed-use building in Allston.[3] We affirm.

Background. The summary judgment record reveals the following facts. Porter owns a three-story home at 80 Linden Street in Allston (Porter property). He resides there on the first floor. The top two floors are rented out. In 2016,

[1] Kelli Alvarez and Kevin Arsenault.

[2] Board of Appeal of Boston.

[3] Only Porter and Brighton Gardner have participated in this appeal.

Porter began mobilizing opposition to a proposed development project at 89-95 Brighton Avenue and 41 Gardner Street (locus), which is separated from 80 Linden Street by Brighton Avenue, a three-story house, and an eight-pump gas station. The development plans for the locus call for replacing a Budget Rent-A-Truck office, a vacant three-story commercial building, and a multi-family dwelling with a 129-unit, six-story apartment complex with retail space on the first floor and seventy-nine parking spots.

The plaintiffs filed their complaint in Superior Court on July 5, 2017, challenging Brighton Gardner's zoning variance. On January 19, 2018, Brighton Gardner filed a motion for summary judgment on the basis of insufficient standing. Following a hearing, the motion judge issued a thoughtful thirteen-page memorandum allowing Brighton Gardner's motion. Porter timely appealed.[4]

[4] Porter filed a separate notice of appeal from a different judge's postjudgment order pursuant to G. L. c. 231, § 117, requiring him to file a bond in the amount of $25,000. Porter's brief does not contain any argument regarding the propriety of the bond order, and thus, he has waived his appeal from that order. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975) ("The appellate court need not pass upon questions or issues not argued in the brief"). We note that we cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time. The rules were wholly revised, effective March 1, 2019, and the provision quoted supra is now found at Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1630 (2019).

Discussion. Porter argues that he is afforded standing as a "person aggrieved" because he will be injured by (1) the project's density, (2) increased traffic and decreased parking in his neighborhood, (3) negative impacts on the neighborhood's quality of life, including views, light, air, and privacy, and (4) a diminution in value of his property. We review de novo the allowance of Brighton Gardner's motion for summary judgment. See 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 699 (2012). The evidence is viewed in the light most favorable to the opposing party, and we ask whether "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law based on the undisputed facts" (quotation and citation omitted). Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474 (2013).

Under the Act, only a "person aggrieved" can challenge a decision of Boston's zoning board of appeal. See St. 1956, c. 665, § 11, as amended through St. 1993, c. 461, § 5. See also Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 11 (2009). Because § 11 of the Act resembles § 17 of G. L. c. 40A, we "import the teachings of decisions under G. L. c. 40A to cases arising under the [A]ct and the [Boston zoning] code." McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930, 930 (2004). To be aggrieved, a person "must assert a plausible claim of a definite violation of a private right, a

private property interest, or a private legal interest" (quotation omitted). Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 120 (2011).[5] To establish standing as an aggrieved person, Porter was required to "put forth credible evidence to substantiate his allegations." Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Toward this end, evidence is credible only when it is both quantitatively and qualitatively sufficient. Butler v. Waltham, 63 Mass. App. Ct. 435, 441-442 (2005).

> "Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. . . . Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action. Conjecture, personal opinion, and hypothesis are therefore insufficient."

Id. at 441. Based on these principles, we conclude that Porter's evidence, submitted at the summary judgment stage, was quantitatively and qualitatively insufficient. Each of his four claims is addressed in turn.

1. Density. Porter makes two arguments regarding density. He first argues that "density-based claims of harm" have a

[5] The motion judge avoided the question whether Porter is entitled to a presumption of standing under the Act, determining that even if a presumption applies it was effectively rebutted by Brighton Gardner. See 81 Spooner Rd., 461 Mass. at 700-701. We adopt the same approach. As described infra, to the extent Porter was entitled to any presumption of standing, Brighton Gardner effectively rebutted that presumption by "coming forward with credible affirmative evidence" refuting it. Id. at 702.

"talismanic quality, such that when 'density' is invoked an abutter invariably and almost per se has standing." We disagree. Porter's claims regarding "density," like any other claim of harm, must be supported by credible qualitative and quantitative evidence. See id. Here, Porter offered no evidence beyond his empty invocation. There is, thus, no specific factual support or basis to conclude that the claimed injury likely will flow from the board's action. See id. Accordingly, this argument fails. Second, Porter claims that there will be overcrowding on public transportation and a negative impact on his "personal enjoyment of outdoor spaces." These claims are not, as they must be, particularized or unique. See id. As such, they fail to adequately assert a "harm specific to [Porter's] property." Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 603 (2011). Porter's density theory of standing fails.

2. Traffic and parking impacts. Next, Porter asserts that the proposed development will create traffic and cause increased competition for parking spots in the neighborhood. In support of his position, he offered the testimony of transportation expert Kim Eric Hazavartian, who offered an incomplete review of

the relevant documents[6] and only vague conclusions as to the impact on the plaintiffs -- determining, for example, that the development "would be likely to harm nearby residents or owners." Again, there was no showing of a particularized harm specific to the Porter property.

In opposition, Brighton Gardner offered an affidavit on traffic impacts from expert traffic engineer David A. Bohn. Based upon original data and analysis, Bohn stated that the project would increase car trips surrounding the development by less than three percent, and that this minimal increase would not impact the Porter property because of documented traffic patterns on Linden Street and Brighton Avenue. In the end, Porter again failed to show that the harm regarding traffic and parking, if any, was particularized to him. See Butler, 63 Mass. App. Ct. at 440 ("the plaintiff must show that the injury . . . is special and different from the injury the action will cause the community at large"). Relying on traffic and parking impacts, Porter again failed to establish the requisite standing.

3. Quality of life. Next, Porter claims that the development will negatively impact his access to light, air,

[6] Hazavartian did not consider or review the "Transportation Access Plan Agreement" created through collaboration between Brighton Gardner and the Boston transportation department.

views, and privacy. These naked allegations were completely unsupported by evidence. Additionally, Brighton Gardner, in opposition, offered photographs establishing that the locus will be difficult to see from the Porter property, that it will not overshadow or reduce light or air flow at the Porter property, and that it is a significant distance away from the Porter property. Again, Porter offers only conclusory statements and makes no showing of particularized harm. See Butler, 63 Mass. App. Ct. at 440. Hence, Porter's quality of life argument in support of standing must fail.

4. Diminution in value. Finally, Porter argues that the value of the Porter property will be negatively impacted by the proposed development. Specifically, he claims that the project's additional 129 rental units in the neighborhood will drive the rent down in the rental unit Porter owns. We echo the trial court in reciting that business competition is not a legally cognizable harm for zoning purposes. See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 429-431 (1949). See also 81 Spooner Rd., 461 Mass. at 702 (lack of standing can be shown where plaintiff's claims of aggrievement "are not interests that the Zoning Act is intended to protect").[7]

[7] Regardless, Porter points to no sworn statement or other admissible evidence submitted to the motion judge that could support his claim of diminution in value. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002) (nonmoving party may

We discern no error in the allowance of the summary judgment motion or in the judgment of dismissal for lack of standing that followed.

Judgment affirmed.

Postjudgment order requiring bond affirmed.

By the Court (Hanlon, Desmond & Shin, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: August 16, 2019.

not rest on allegations or denials). See also Chokel v. Genzyme Corp., 449 Mass. 272, 279 (2007) (party has duty to include in record appendix any document upon which he relies).

[8] The panelists are listed in order of seniority.